INDEX.

TABLE OF CASES CITED:

OTHER AUTHORITIES CITED:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .

PHILIP PARIS, MILES A. ROGERS, HERMAN MEYRICH, JOSEPH H. LEVY, HARRY SCHECHTER and NATHAN ROSENBAUM, suing on behalf of themselves and all others similarly situated who may come in and contribute to the expenses of this suit,

Petitioners,

—against—

METROPOLITAN LIFE INSURANCE COMPANY, CECIL J. NORTH and E. J. NICHOLAS,

impleaded with

LEON W. BERNEY.

BRIEF OF METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Opinions Below.

The opinion of the District Court is printed on pages 230-244 of the Transcript of Record. The opinion of the Circuit Court of Appeals is reported at 167 F. (2d) 834, and is set forth as Appendix A annexed to petitioners' brief.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on May 10, 1948. The petition for a writ of certiorari was filed on August 7, 1948. The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1.

Questions Presented.

On the merits, this case turns on the construction of §§ 213(7) and 213-a(5) of the New York Insurance Law which, as part of a detailed scheme of life insurance regulation, expressly forbid payment to life insurance agents of "any compensation greater than that which has been determined by agreement made in advance of the payment of the premium"* or "in advance of the rendering of such service".†

These statutes have never been construed by any State Court.

The case arises by reason of a provision in a "directive order" of the National War Labor Board that Metropolitan Life Insurance Company should pay certain of its agents a retroactive increase of compensation. The New York Superintendent of Insurance had previously advised the company that the granting of such retroactive increase would violate the

---

* Insurance Law § 213(7) applicable to ordinary life insurance as reenacted in 1939; originally adopted in 1906 as Insurance Law § 97.

† Insurance Law § 213-a(5) applicable to industrial life insurance adopted in 1940.

New York statutes (fols. 342-345).* The parties agreed on the suggestion of the War Labor Board and before its decision to leave this question to the courts (fols. 351-2).

Petitioners, as assignees of agents, instituted the present equity suit in the District Court for a declaratory judgment. The complaint asks that the New York statute be held inapplicable as a matter of construction, and inoperative by reason of the War Labor Board "directive order" (fols. 47-8). Petitioners further asserted in their pleading that the New York statutes were unconstitutional because of the exclusive power of Congress to regulate interstate commerce (fols. 231-232).

The District Court agreed with the petitioners (fols. 706-729).

On appeal the State of New York filed a brief *amicus curiae* attacking the position of the District Court.

The Circuit Court of Appeals unanimously held that since the delicate question of the constitutionality of the statutes and their supersession by the War Labor Board "directive order" would only have to be answered if the statutes were construed contrary to petitioners' views, and since the state courts had never construed these statutes and a construction by the federal courts would not be binding on the State, the case should be remanded to the District Court pending determination by the state courts of the question of construction.

---

* Unless otherwise stated, references are to the Transcript of Record in the Circuit Court of Appeals.

The following question is thus involved on this petition:

1) Whether the Circuit Court of Appeals, in this equity suit for a declaratory judgment, erred in holding that the construction of the State statutes involved should be remitted to the state courts for determination before the federal courts pass upon questions of constitutionality or supersession.

If the writ of certiorari should be granted, the following additional questions will be involved, upon neither of which the Circuit Court of Appeals has passed:

2) Whether §§ 213(7) and 213-a(5) of the New York Insurance Law forbid the retroactive increases of compensation to insurance agents here involved.

3) If so, whether the "directive order" of the National War Labor Board superseded the State statutes and rendered their application unconstitutional.

Statutes Involved.

The chief statutes involved are: New York Insurance Law, Sections 213 and 213-a, the War Labor Disputes Act (10 U. S. C. Secs. 1501-1511), and Public Law 15 (15 U. S. C. Secs. 1011-1014).

Statement.

Defendant Metropolitan Life Insurance Company (hereinafter referred to as "Metropolitan") is a New York corporation engaged in the business of issuing life, accident and health insurance. It is a

mutual company and has no stockholders. Its business has always been managed and its affairs administered from its principal office in New York City. It is operated solely for the benefit of its policyholders, who bear the entire cost of its operations and derive the benefit from any savings (fols. 386-7).

Metropolitan agents, including petitioners, sell both ordinary and industrial life insurance, as well as other forms of insurance issued by the Company. Complying with the statutes, upon appointment by Metropolitan, each agent executes an individual written "agency agreement" defining his duties and specifying in detail the rates of compensation for selling, collecting and conserving insurance (fols. 291, Ex. B-1, fols. 571-609). The rates are uniform for all agents performing similar duties (fols. 402, 698). These individual agreements have continued to be executed since collective bargaining agreements were made with unions representing agents and are specifically referred to and contemplated by all collective bargaining agreements (fols. 291, 457-8, 453, 484, 645-6).

United Office and Professional Workers of America, C. I. O. (referred to as UOPWA) and its affiliate, Industrial Life Insurance Agents, Local 30 (sometimes collectively referred to herein as "the unions") were bargaining representatives for certain agents of Metropolitan. Agents in the New York metropolitan area were organized by Local 30. Agents in New Jersey, Pennsylvania, Illinois, Massachusetts, Michigan and Connecticut were organized by UOPWA. The remainder of the agents throughout the United States and Canada were not represented by these unions and were not parties to the proceedings (fol. 698).

In June 1942, a dispute arose between Local 30 and Metropolitan respecting demands for increased compensation and changes in other working conditions. A similar dispute thereafter arose with UOPWA. In October 1942, the dispute with Local 30 was certified to the National War Labor Board at the instance of the union, the Company expressly refusing to join in the application to the Board (Ex. E, fols. 656-7; Ex. F, fol. 673).

The National War Labor Board took jurisdiction of the dispute.*

While the dispute was being considered by the Board, Metropolitan and Local 30 entered into a collective bargaining agreement resolving all the issues except increased compensation. The collective bargaining agreement signed on May 7, 1943 merely recited the fact that the question of compensation was being considered by the War Labor Board (Ex. 5-A, fol. 443). Thereafter, similar collective bargaining agreements were concluded with UOPWA for agents represented by that organization.

No agreement was ever made by Metropolitan to treat the War Labor Board as arbitrator or to accept its decision as a binding determination, and no such contention or suggestion was ever advanced by the union before the Board (fols. 360-361).

In fact the record is clear the Metropolitan expressly refused to join with the union in asking the

* The War Labor Disputes Act empowered the Board upon certification that a labor dispute could not be settled by collective bargaining or conciliation, "to summon both parties to such dispute before it and conduct a public hearing on the merits of the dispute" (Sec. 7(a)(1)).

Board's intervention (Ex. E, fols. 656-7; Ex. F, fol. 673.)

In the course of the hearings before the Board the union demanded that any increase in compensation be made retroactive to the date of certification of the dispute to the War Labor Board. Metropolitan not only denied that there was justification for any increase, but from the first consistently maintained that retroactive increases were forbidden by the New York Insurance Law (fol. 338). The Regional Board recommended both a prospective and retroactive increase. The matter was taken to the National Board (fol. 57), where the dispute with the UOPWA was consolidated with the Local 30 case (fols. 530-532).

Before the National War Labor Board Metropolitan reiterated its position that no increase was warranted and that in any event the New York Insurance Law prohibited the granting of any retroactive increase.

The New York Superintendent of Insurance expressly informed Metropolitan that if it paid any retroactive increases recommended by the War Labor Board such act would constitute a violation of the New York Law (fols. 342, 345). Such violation is a criminal offense under the statute (Insurance Law, Sec. 5).

The War Labor Board was concerned with the genuine problem presented. It doubtless realized that its "directive orders" could not affect legal rights and it did not wish to direct the parties to act contrary to the State statutes. Accordingly, prior to making its decision the National War Labor Board

encouraged the parties to enter into a stipulation which would leave to the courts the legality of the retroactive increase under the New York statutes (fols. 360-5). The stipulation, dated July 19, 1944, provided that if any increase in compensation should be directed by the War Labor Board, collective bargaining agreements so providing would be entered into and Metropolitan would pay the increases *prospectively* (fol. 121), but if the National War Labor Board directed retroactive payment of increases Metropolitan would simply deposit the money in escrow "pending the final determination of an action to be instituted in a court of competent jurisdiction of the question whether the provisions of §§ 213 and 213-a of the New York State Insurance Law constitute a bar to the payment by Metropolitan to its agents of retroactive increased compensation" (fols. 122-3).

On September 18, 1944 the National War Labor Board confirmed the action of the Regional Board by a vote of 7 to 5, directing both prospective and retroactive increases. In accordance with the stipulation, Metropolitan paid the prospective increases and made the escrow deposit.

On January 6, 1945 petitioners, as assignees for certain of the agents, instituted the present suit for a declaratory judgment.

The District Court (Mandelbaum, *J.*), despite defendants' objection that the question of construction should first be passed upon by the state courts (fols. 279-280, 379), proceeded to hand down a decision construing the New York statute in accord-

ance with petitioners' contentions and further holding that to apply the statutes to the situation in the face of the "directive order" of the War Labor Board would be unconstitutional (fols. 694-731).

An appeal was taken to the Circuit Court of Appeals, where the State of New York filed a brief amicus curiae assailing the construction of the statute adopted by the District Court.

The Circuit Court of Appeals unanimously reversed (L. Hand, A. N. Hand and Chase, JJ.), and directed that the questions of constitutionality and supersession should not be determined by the District Court until the state courts had been given an opportunity to pass upon the question of statutory construction.

Argument.

POINT I.

The Circuit Court of Appeals correctly held that the federal courts should refrain from passing upon any constitutional question until the state courts had construed the state statutes.

A. The Decision Was In Accordance With the Authorities.

The decision of the Circuit Court of Appeals followed the well-established principle repeatedly laid down by this Court, that where a plaintiff attempts to invoke the equity jurisdiction of the federal courts to impugn a state law, consideration of the federal

question should be withheld until the state courts have been given an opportunity to construe the state law.

In *Railway Commission of Texas* v. *Pullman Company*, 312 U. S. 496 (pp. 499-501), this Court wrote:

> "* * * But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. * * * the last word on the statutory authority of the railroad commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication.
>
> "* * * The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.
>
> "* * * These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion', restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. * * *
>
> "This use of equitable powers is a contribution of the courts in furthering the harmonious relations between state and federal authority without the need of rigorous congressional restriction of those powers. * * *

"Regard for these important considerations of policy in the administration of federal equity jurisdiction is decisive here. * * * In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands."

Accord:

Chicago v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168 (1942);
Spector Motor Co. v. *McLaughlin*, 323 U. S. 101 (1944);
Alabama State Fed. of Labor v. *McAdory*, 325 U. S. 450 (1945);
Asbury Hospital v. *Cass County*, 326 U. S. 207 (1945);
A. F. of L. v. *Watson*, 327 U. S. 582 (1946);
Green v. *Phillips Petroleum Corp.*, 119 F. 2d 466, cert. den. 314 U. S. 637.

What is here under attack are two important sections of the New York Insurance Law, which this Court has called "a comprehensive and detailed plan for regulation of all types of insurance" (*Hoopeston Co.* v. *Cullen*, 318 U. S. 311, 314). The history and purposes of the statute are summarized in Point II of this brief.

Petitioners seek to supersede the construction which the Superintendent of Insurance of the State of New York gave to these statutes (fols. 343-345). The State of New York considered the public interest sufficiently concerned to file a brief *amicus curiae* in the Circuit Court of Appeals.

Under the circumstances, the unanimous opinion of the Circuit Court of Appeals as to the proper procedure was inevitable.

B. The Point Was Not Waived By the Parties.

Petitioners now contend that the stipulation between the insurance company and the unions precluded the federal courts from determining for themselves the correct procedure to follow in exercising their equity jurisdiction.

Factually, there is no basis for such a claim. The stipulation merely gave the unions "the *initiative* to choose * * * the forum" (fols. 124-5). This was not a stipulation that defendants could not object if the union chose an inappropriate forum.*

However, even if the parties had expressly agreed that the question of statutory construction should be determined in the Federal Court by suit for a declaratory judgment, such agreement would not be binding upon the courts.

In *Green* v. *Phillips Petroleum Co.*, 119 F. 2d 466, cert. den. 314 U. S. 637, the parties agreed to litigate the construction and validity of the Iowa Chain Store Tax in the Federal Court. The Circuit Court of

---

* Nor is there any evidence in the record, or basis outside the record, for petitioners' irrelevant assertion that the Superintendent of Insurance decided or purported to decide which was the proper forum. The proposed escrow stipulation was submitted to the Superintendent of Insurance, and all he did was to let Metropolitan know informally that he would not object to the execution of that stipulation in the form in which it was later signed. There was never any formal proceeding or hearing before the Superintendent, and he never purported to decide what was the proper forum or to advise the parties with respect thereto.

Appeals remanded, directing the District Court to retain jurisdiction pending a determination by the State Court, writing:

> "* * * This decision of the Supreme Court [*i. e., Railroad Comm.* v. *Pullman Co.,* 312 U. S. 496] requires as we understand it, in a case such as this—where the question upon which the case turns is one of state law as yet undetermined by the courts of the state and affecting an important state policy such as that of taxation—that the federal district court as a court of equity must, in the exercise of a wise discretion and because of ' "scrupulous regard for the rightful independence of the state government" and for the smooth working of the federal judiciary' (Id. p. 645 of 61 S. Ct.,) stay its hands, provided that the situation is such that a definitive determination of the issue of state law may be obtained by the parties through recourse to the state courts. *We gather that the exercise of this discretion is a matter of judicial policy which can not be controlled by the wishes or agreements of the parties litigant"* (p. 649). (Italics ours.)

The granting of a declaratory judgment is always discretionary, and this Court has indicated that such a declaration should not be granted under circumstances, such as are here involved, until the state courts have passed upon the question of statutory construction.

In *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, this Court wrote:

> "The extent to which the declaratory judgment procedure may be used in the federal courts to

control state action lies in the sound discretion of the Court.

"* * * It would be an abuse of discretion for this Court to make a pronouncement on the constitutionality of a state statute before it plainly appeared that the necessity for it had arisen, or when the Court is left in uncertainty, which it cannot authoritatively resolve, as to the meaning of the statute when applied to any particular state of facts" (p. 471).

Meredith v. *Winter Haven,* 320 U. S. 228, cited by petitioners, expressly recognized the principle here involved, but held it inapplicable to a case where the highest State Court had already passed upon the question of construction and no discretionary relief or federal question was involved.

Petitioners also attempt to convey the impression that in some way Metropolitan waived the point that the question of construction should be determined by the state courts. Petitioners, after referring to the fact that this point was raised by counsel for Metropolitan at the opening of trial, make the remarkable statement that "the trial continued without any further reference to this subject by counsel", and that petitioners assumed that counsel for Metropolitan "abandoned this contention" (pp. 8-9 of petitioners' papers).

The printed Transcript of Record shows the utter baselessness of these assertions.

Not only did counsel for Metropolitan make the point at the opening of the trial, but he raised and

argued it elaborately again on the motion to dismiss the complaint at the close of the plaintiffs' case (Transcript of Record, pp. 93-94). And he raised the point a third time at the end of the entire case, specifically urging that since "the case involved the construction and application of a State statute not previously construed by the State courts * * * decision in this case await appropriate adjudication by the State courts" (Transcript of Record, p. 127).

The point was briefed in the District Court and on the appeal to the Circuit Court of Appeals, and was raised at every possible stage of the case.

C. The Decision of the Circuit Court of Appeals Is Practical.

The contention that petitioners cannot follow the procedure suggested by the Circuit Court of Appeals is without foundation. Petitioners may go into the New York State courts and obtain a declaratory judgment of the question of state law under the state declaratory judgment provisions (New York Civil Practice Act, § 473; *White* v. *Boland,* 254 App. Div. 356).

This was the procedure suggested by the decisions already cited. (See *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U. S. 101, 106; *American Federation of Labor* v. *Watson,* 327 U. S. 582, 599.)

Such declaratory judgment procedure was used in *Eline's Inc.* v. *Town of Milwaukee,* 135 F. (2d) 878, where the Circuit Court of Appeals remanded a case to the District Court to be held until determination by the state courts of the question of statutory con-

struction. The plaintiff then went into the State Court and obtained such a declaratory judgment (*Eline's Inc.* v. *Town of Milwaukee,* 245 Wis. 648).

This procedure is a thoroughly sound one to follow in the instant case, for if the New York courts should agree with the petitioners' construction of the New York statutes, there will be no need for the federal courts to pass on the delicate questions of constitutionality or supersedure of state law. On the other hand, if the state courts should uphold the construction adopted by the Superintendent of Insurance there will then be time enough for the federal courts to consider any possible federal questions.

The contention that delay will work an injustice to petitioners is fanciful. The regular or current pay of the agents is not involved, but only a small amount of additional back pay for each individual agent, the maximum net interest of any one agent being $71.15 (fols. 142-174).

The primary consideration is the public interest in protecting policyholders, to whose benefit any savings of this mutual insurance company will redound.

D. The Question of Construction Is the Crucial Question.

Petitioners' belated assertion that this case does not involve any question of statutory construction is negatived by their own pleadings (fols. 20-53, 231-232), the opinions in the Court below and their own arguments.

The case turns on the construction of §§ 213 and 213-a of the New York Insurance Law. In fact, this

was the only question which under the escrow stipulation was to be decided by the courts, *i. e.*, "whether the provisions of Sections 213 and 213a of the New York State Insurance Law constitute a bar to the payment by the Metropolitan to its agents of retroactive increased compensation" (Ex. C, fol. 123).

Whether any Federal question will ever be presented depends on the construction given to these important New York statutes. The Circuit Court of Appeals correctly held that the New York courts were the proper forum to interpret a New York statute.

POINT II.

Sections 213 and 213-a of the New York Insurance Law forbid any retroactive increase in the compensation of insurance agents, regardless of the manner in which such increase is determined.

Subdivision 7 of Section 213, as re-enacted in 1939 relating to ordinary life insurance, provides so far as here relevant:

> "*No such company,* and no person, firm or corporation on its behalf or under any agreement with it, *shall pay or allow to any agent,* broker or other person, firm or corporation for procuring an application for a life insurance policy, *for collecting any premium thereon or for any other service* performed in connection therewith *any compensation greater than that which has been determined by agreement made in advance*

of the payment of the premium * * *." (Italics ours.)

Subdivision 5 of Section 213-a, which was added in 1940 to deal similarly with industrial life insurance, provides:

> "*No such company,* and no person, firm or corporation, on its behalf or under any agreement with it, *shall pay or allow to any agent*, broker, employee or other person, *for services* in procuring an application for industrial life insurance, for collecting any premium thereon or for any other service performed in connection therewith, *any compensation greater than that which has been determined by agreement made in advance of the rendering of such service.*" (Italics ours.)

Petitioners urged in the District Court, and that Court erroneously accepted their argument, that these statutes, despite their unequivocal language, were not intended to apply where the compensation was not "excessive, unreasonable and discriminatory" or where it resulted from a "legitimately decided labor dispute" ending in "collective bargaining agreements" (fols. 709-710). This construction is directly contrary to the uniform interpretation given to the statute by successive Superintendents of Insurance and to the plain legislative history. It would render ineffective the limitations of the statute, and would make practical administration impossible.

The District Court's misconstruction of the statute impelled the State of New York to file a brief *amicus curiae* in the Circuit Court of Appeals.

Origin and Purpose of §§ 213 and 213-a of the Insurance Law.

Sections 213(7) and 213-a(5) are part of an exhaustive legislative code regulating insurance companies doing business in New York. Section 213(7) (or its equivalent, old § 97) has been continuously in effect since 1906, as part of the code adopted on the recommendation of a Joint Committee of the State Legislature, known as the Armstrong Committee, which investigated "the cost of life insurance, the expenses of said companies" and other phases of the business. The counsel for this committee was the late Honorable Charles Evans Hughes.

To control the cost of insurance (of which agents' commissions constitute an important part), strict provisions were adopted for limiting expenses.

On the specific point here involved, the Armstrong Committee recommended as follows:

> "All commissions should be definitely agreed upon in advance and should be a fixed percent of the premium for each $1000. of insurance" (Report of Joint Legislative Committee to Investigate the Business of Life Insurance, Proceedings, vol. 7, p. 306).

Following this recommendation, the Legislature in 1906 adopted *inter alia* Section 97 of the Insurance Law, which contained substantially the same language as the present § 213 (7), forbidding retroactive increases of compensation to agents selling life insurance.

Sections 213 and 213-a are accurately entitled "Limitation of Expenses". Other provisions of the same sections restrict compensation of agents to an even greater degree, by putting a top limit on certain types of commissions, and by forbidding bonuses, prizes, "or any increase or additional commissions or compensation of any kind whatsoever" based upon volume. (See §§ 213 (8), (9) and 213-a(6), (7).)

The statutory purpose is plain: (1) expenses of conducting the insurance business are rigidly controlled for the benefit of policyholders both by providing a ceiling on agents' commissions and by requiring that the amount of their compensation be definitely fixed in advance by agreement; (2) savings for the benefit of policyholders in any year may not be dissipated by payment of additional compensation to agents after the rendition of their services; (3) statutory limitations on expenses may not be evaded by increases paid in a subsequent year on business produced in a prior year; and (4) expenses incurred in one period must be borne by policyholders of that period and not by subsequent policyholders, as would occur if retroactive increases were permissible.

The Uniform Application of the Statute Leaves No Room for Judicial Discretion.

Since 1907, the Superintendents of Insurance, charged with the administration of the statute, have consistently ruled that retroactive increases were absolutely forbidden, regardless of uniformity of treatment or the fairness of the increase.

The rulings are contained in the Transcript of Record (Ex. A, pp. 188-190).

We here quote from two:

> "I think this language was used deliberately to prohibit any added compensation being paid to an agent of an insurance company by any subsequent arrangements made after their original contract was entered into. If it does not mean this, I am at a loss to give this language any force in construing this section * * *." (Extract from letter dated November 20, 1907 to George E. Ide, Pres., Home Life Ins. Co.)

On two other occasions Superintendents ruled specifically that company contracts with agents could not, under the law, be liberalized retroactively:

> "In your letter of September 29, you inquire whether a company would be permitted to liberalize certain features in an old agency contract and make the improved features retroactive. I am of the opinion that in view of the provisions of sub-division 3, section 97, New York Insurance Law, this cannot be legally done." (Extract from letter dated October 7, 1929 to Prudential Life.)

The necessity of an absolute rule not subject to the disintegration of uncertain exceptions is pointed out in the State's brief *amicus curiae.**

The Statute Applies to Collective Bargaining Agreements.

In the District Court petitioners vigorously contended that because the statutes in question were originally enacted in 1906, the Legislature could not have had in mind collective bargaining situations,

* Reprinted in petitioners' papers on this motion at pp. 52-55.

and petitioners succeeded in having the District Court adopt that view.

Actually, however, the entire statutory scheme was re-examined by the New York Legislature in 1937 and 1938 in the light of its impact on the field of collective bargaining by a Joint Committee of the Legislature, known as the Piper Committee, charged with the general revision of the New York Insurance Law, including a study of the "contractual relations of said [life insurance] companies with their policyholders and with their agents" (N. Y. Leg. Ind. 1938, p. 610).

After protracted hearings, the prohibitions on retroactive increases in agents' commissions, originally adopted in 1906 (old Sec. 97), were re-enacted in 1939 as Section 213(7), and in 1940 were *extended* to industrial life insurance (Section 213-a(5)). In so legislating, the Legislature acted with full knowledge of the New York Labor Relations Act (which had been passed in 1937) and with full knowledge that New York agents of Metropolitan (as well as other insurance companies) were represented by labor unions. In fact (as will be shown below), the two unions involved in the instant case were represented at these legislative hearings and actively participated in them.

The proceedings of this Piper Legislative Committee show that the question was raised whether the problems involving the working conditions of insurance agents should be referred to another then functioning legislative committee known as the "Ives Committee" (charged generally with the duty of investigating matters relating to labor relations). Representatives of these unions opposed this, urging that

insurance was a special subject which should be handled exclusively by the Insurance Department. Defendant Berney (one of the escrowees nominated by the unions) then representing Local 30 and now Vice President of UOPWA, stated:

> "Insurance, we think, is not the same as any other normal business. Insurance has no private owner. * * * I think that is behind the revision of the law and of the original law of insurance, that is the Department should be in control, because it is a public institution, for regulation, and we say that if this Department is to regulate insurance, it will have to regulate the very basic element, and that is the contract between the public [*sic*] and the individual actually conducting the business of the company" (p. 220).*

Mr. Berney urged that relations between the companies and their insurance agents should be considered "not so much as a question of labor relations, although it is involved, but as a question of protecting the interests of the public, which is the purpose of every one of the amendments practically, which is the purpose of limiting the expense of insurance * * *" (p. 221).*

At page 222, the chairman asked directly whether the questions involved were not for the Labor Relations Committee. Mr. Berney replied (p. 223), "My position is that the problem cannot be solved by an outside agency effecting control over the head of the Insurance Department * * * because their entire function is set up for the control of the insurance industry."*

---

* These quotations are from the minutes of the Joint Legislative Committee for re-codification of the Insurance Law, October 25 and 26, 1939.

In the light of the foregoing, it cannot be said that the New York State Legislature enacted the sections in question in disregard of their impact on the field of labor relations.

It was the view of organized labor, as voiced by the representatives of the very unions in this case, that in the public interest insurance required special regulation distinct from the general field of labor relations.

The basic purpose of §§ 213 and 213-a of the New York Insurance Law is to protect policyholders and their dependents by limiting the type of agreements that the management may make with insurance agents. This is a fundamental reason why the State has seen fit to regulate in a most detailed manner the contracts that may be made with agents.

What the Legislature feared was pressure by agents upon management with respect to commission arrangements.

If there was danger to policyholders from the pressure of individual agents, such danger would be multiplied when the pressure became collective.

Any assumption that the various provisions limiting agents' compensation are subject to an unexpressed exception for collective bargaining would render meaningless the 1939-1940 legislation and would totally destroy the protection which the Legislature has for so many years given to policyholders.

There Is No Basis for a Quantum Meruit Recovery.

Petitioners advance the contention that the retroactive provisions of the directive order of the War Labor Board may be treated as an arbitration award and that this would not violate the New York statute.

It is unnecessary to decide the latter question since it is clear from the facts that Metropolitan never agreed to arbitration by the War Labor Board. The Board assumed jurisdiction *in invitum* and from the very start Metropolitan denied the legality of a retroactive increase (fols. 656-657, 673, 360-361).

The purpose of the New York statute is that "all commissions should be definitely agreed upon in advance and should be a fixed percent of the premium" (Report of Armstrong Committee, vol. 7, p. 306). Leaving the question of compensation for past services to a subsequent decision of arbitrators would not comply with the statute which requires not merely that there be an agreement made in advance, but that the rate or amount of compensation itself be determined in advance.

Petitioners also argue that, even though the individual agency agreements fixing compensation had not been terminated during the period of the collective bargaining disputes, the agents should not be deemed to have been working under such individual agreements but were entitled to be paid on the theory of *quantum meruit,* and they urge that the decision of the War Labor Board may be considered a determination of the additional amount to which they were entitled on that basis. Petitioners cite *Martin*

v. *Campanaro*, 156 F. (2d) 127, where the Circuit Court of Appeals for the Second Circuit held that in the case of an *ordinary* employer-employee relationship, after a collective bargaining agreement had by its terms expired and a new one was under discussion, employees continuing to work could not be deemed working under the expired agreement, but were entitled to have the Court determine their compensation *ab initio* on the basis of *quantum meruit*.

Martin v. *Campanaro* has no bearing on the present case, except to the extent that the Court there held the "directive order" of the War Labor Board to be without any effect on the legal rights and obligations of the parties.

The *quantum meruit* theory is not applicable here. A contract in the nature of *quantum meruit* can never be implied where there is "an express contract covering the subject-matter . . . or where an express promise would be contrary to law" (*Miller* v. *Schloss*, 218 N. Y. 400, 406-7). Any *quantum meruit* theory, such as applied in the *Campanaro* case, must be ruled out of consideration on both counts in this case:

First, the *Campanaro* case involved a situation where a previous collective bargaining agreement had by its terms expired, and the Court held that during the interim period before a new agreement was signed the employees could not be considered as continuing to work under the old expired agreement, but were entitled to be paid on a *quantum meruit* basis. In the instant case the agents of Metropolitan, including the plaintiffs, were working under the terms of individual written agency agreements which were contin-

uously in effect and in which their compensation was specified. The only dispute was whether there should be an *increase* in compensation. These agency agreements were specifically recognized as being in force by the collective bargaining agreements, and were merely amended prospectively when an increase was ultimately agreed to after the decision of the War Labor Board (Ex. 5 A, fols. 453, 457-8, 484; Ex. D-1, fol. 646).

Secondly, while a *quantum meruit* relationship between the *ordinary* employer and employee, as in the *Campanaro* case, is legally permissible in New York, Sections 213 and 213-a of the Insurance Law forbid *quantum meruit* arrangements in the case of insurance agents by barring payment of "any compensation greater than that which has been determined by agreement made in advance of the payment of the premium" or "in advance of the rendering of such service". Accordingly, under the New York law, the agents were entitled only to such compensation as had been determined by agreement in advance, and the only agreements determining compensation in advance were the individual agency agreements.

The District Court stated that an interpretation of the statutes in accordance with their express language, "would virtually isolate insurance agents as a class from any other labor class" (fol. 713). But this was precisely what the Legislature intended to do in line with its special treatment of all aspects of the insurance business, a treatment fully justified, as the unions themselves recognized in the legislative hearings.

The existence of the National Labor Relations Act does not prevent reasonable police power regulation

by the states, even though such regulation may have the effect of restricting to some degree the field of collective bargaining (*Allen Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 748-9, 751; *Terminal Railroad Association* v. *Brotherhood of Railroad Trainmen,* 318 U. S. 1, 6-7).

Insurance has long been recognized as a business having a special public interest and the states have customarily regulated all aspects of this business, including compensation to agents, which constitutes so important a part of the cost.

Both this Court and Congress have recognized the necessity and propriety of special state regulation in the insurance field (*Hoopeston Co.* v. *Cullen,* 318 U. S. 313; Public Law 15, 15 U. S. C. §§ 1011-1012).

Public Law 15 in its declaration of Congressional policy, stated (15 U. S. C. § 1011):

> "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

The statute (§ 1012) then provides:

> "a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by

any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless such Act specifically relates to the business of insurance* * * *." (Italics ours.)

POINT III.

The directive order of the War Labor Board did not supersede the State law nor render its application unconstitutional.

It has been repeatedly and uniformly held that the National War Labor Board was vested with no power to affect legal rights and that its directive orders were purely advisory and did not have the force of law.

Martin v. *Campanaro,* 156 F. (2d) 127, cert. den. 329 U. S. 759;
Employers Group of Motor Freight Carriers Inc. v. *National War Labor Board,* 143 F. (2d) 145, cert. den. 323 U. S. 735;
National War Labor Board v. *Montgomery Ward Co.,* 144 F. (2d) 528, cert. den. 323 U. S. 774.

These decisions were based on similar decisions of this Court involving the U. S. Railroad Labor Board, in imitation of which the National War Labor Board was created (*Pennsylvania Railroad Co.* v. *United States Railroad Labor Board,* 261 U. S. 72, 84; *Pennsylvania Railroad System Federation #90* v. *Pennsylvania Railroad Co.,* 267 U. S. 203, 215).

Indeed, the courts have held uniformly that there could be no judicial review or injunction regarding

decisions and acts of the National War Labor Board, even if it exceeded its statutory jurisdiction, since its orders were "merely advisory", "do not affect or alter the legal rights of the parties to the labor dispute" and place "no constraint upon the parties to do what the Board may decide they should do, except moral constraint".*

Congress could hardly have intended by implication to give to a Board with purely advisory functions, not subject to judicial review, the power to supersede state laws in a field which the states have always regulated.

As this Court stated in *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, 152, 154:

> "Where Congress has not clearly indicated a purpose of precipitating conflict, we should be reluctant to do so by decision.
>
> Local conditions, customs and policies will not be over-ridden without fighting for consideration * * *. Congress has given no indication that it would withdraw all such State authority into the vortex of the war power. Nor should we rush the trend of centralization where Congress has not" (p. 154).

The function of the National War Labor Board was to facilitate, under war conditions, the making *by the parties* of collective bargaining agreements, by bringing public opinion to bear in support of what the Board regarded as a fair basis for agreement. The National War Labor Board decisions had no self-

* Brief of United States in *Employers Group of Motor Freight Carriers Inc.* v. *National War Labor Board,* 143 F. (2d) 145.

operating effect; they were simply a means of putting pressure upon the parties to come to an agreement.

Since the parties could not have superseded state law as to retroactivity by collective bargaining agreements independently made, they had no greater power because the prohibited conduct might have been erroneously recommended by the War Labor Board.

This was recognized by the War Labor Board itself when prior to handing down its decision it encouraged the parties to make a stipulation which left to the courts the question whether the New York statutes were intended to bar a retroactive increase in this case.

The proper courts to decide this question are the courts of the State of New York. Only if the New York courts answer that question in the affirmative will the federal courts find it necessary to pass on the constitutional questions urged in the petition.

CONCLUSION.

The decision of the Court below was correct and the petition should therefore be denied.

Respectfully submitted,

BURTON A. ZORN,
Attorney for Metropolitan Life Insurance Company.

BURTON A. ZORN,
EUGENE EISENMANN,
PHILIP W. HABERMAN, JR.,
Of Counsel.

New York, New York,
September 9, 1948.